IN THE CIRCUIT COURT OF THE CITY OF SUFFOLK, VIRGINIA.

SOUTH BOSTON SAVINGS BANK *v.* FRANK JOHNSON.

February Term, 1911.

Executions—Liens on Debts Due Judgment Debtor—What Are Not Such Debts—Code, §§ 3601, 3609—Payment of Wages in Advance.—If, after service of notice on the employer of a judgment debtor under § 3601 of Code 1904, such debtor and garnishee enter into a new agreement of employment by the terms of which the employer is to pay the daily wage agreed upon to the employee each day *in advance,* such wages, paid by the employer after notice of the fieri facias and before its return day, are not such debts due the judgment debtor by the garnishee as are subject to the lien of the fi. fa.

On a suggestion by a judgment creditor that by reason of the lien of his writ of *fieri facias,* there is liability on a garnishee.

Robt. W. Withers, for the plaintiff.
R. H. Rawles, for the defendant.

STATEMENT OF CASE.

In this case the South Boston Savings Bank obtained a valid judgment against Frank Johnson on December 17, 1910, on which execution was issued and placed in the hands of the Sergeant the same day, which execution was returnable February 15, 1911. On December 24th, 1910, the judgment creditor in due form gave notice to the Parker Manufacturing Company, the employer of the judgment debtor, of the existence of his judgment and execution and the fact that such garnishee would be affected thereby, in accordance with the terms of section 3601 of the Code. After the return day of the execution, the garnishee having made no response thereto, the judgment creditor sued out a summons against the garnishee and judgment debtor requiring the former to appear at the next term of the circuit court of the city of Suffolk, to be examined on oath to disclose what liability, if any, rested upon him by reason of such execution and notice.

On the return day of garnishment, garnishee appeared and testified that, at the time of service garnishee had nothing in hand to which judgment debtor was entitled, and that, upon service of the garnishment, debtor refused to remain in his employ longer, under the usual contract of service, but stated that he would work, provided garnishee would advance to him each day, before any work was done, the per diem of $2.50. His services being

very necessary, the terms were met and money advanced. During the period between the service of garnishment and return day of same some Ninety ($90.00) Dollars or more was advanced to debtor.

On behalf of the judgment creditor it was argued that these facts on their face showed an attempt to commit a fraud on the process of the court and upon the rights of the creditors, which, if successful, would result in a practical repeal of all our garnishment laws where wages are concerned. If the employer could pay in advance for one day's service and escape liability, he could likewise pay in advance for a week's, a month's or a year's service, the practical result of which would be to permit the judgment debtor to enjoy his income, it may be of thousands of dollars a year, and escape the payment of all his just debts. Such a result, like a spendthrifts trust, is against public policy. Hutchinson *v.* Maxwell, 100 Va. 169.

It was further argued for the creditor, that it made no difference in law whether the consideration for the wages paid each morning was the promise to work of the employee or services already rendered by him; that, in either event, there was a time, during the life of the fi. fa., when the employer owed a debt to the employee which he had chosen to pay the judgment debtor, despite the garnishment, and therefore, there was liability on the garnishee to the judgment creditor to that extent. It was insisted that when the employee presented himself each morning and offered to work, immediately the employer became liable to him for $2.50 which the employee could have recovered in an action of debt or assumpsit. It is no defense to such liability to say that the employee might have refused to work at the end of any day, or that, if he had not been paid in advance, he would have quit; the fact is, he did not quit.

The only inquiry is, during the life of the fi. fa. did the garnishee "have in his possession personal estate of or to which the judgment debtor was entitled." The fact that the garnishee, during the life of the fi. fa. paid the judgment debtor $97.50, conclusively answers this inquiry in the affirmative.

On behalf of the garnishee it was argued that, as the employee could have terminated the contract of employment at any time, his creditor would be in the same position when he was paid in advance as if he had not worked at all; that the payments made the judgment debtor were in the nature of advances, and that, instead of the employer being indebted to the employee, the fact was, through-out the life of the fi. fa. the judgment debtor was always indebted to the garnishee.

Judge James L. McLemore, who heard the case, without a jury, rendered an oral opinion from the bench at the conclusion of the argument, the court holding that no fraud had been shown

by the evidence to have been intended by the garnishee on the judgment creditor, the action of the garnishee being prompted by his desire to retain the services of a valued employee which otherwise would have been lost; that, as the employee might have defeated the collection of the judgment by refusing employment, the creditor was not injured by his accepting employment under such conditions that the employer would never be indebted to him; that the facts showed there was never a debt due by the Parker Manufacturing Company to Frank Johnson after the 24th day of December, 1910 and before February, 15th, 1911; that during this interval the garnishee owed nothing to the judgment debtor; that the payment of the day's wages was a condition precedent to the rendition of the service; and that the employer could not have demanded the service, if he did not actually pay in advance.

Judgment for the garnishee.

Note.

On its face this case presents the most novel and ingenious way for a wage earner, against whom a judgment has been recovered, to beat his creditors out of their claims, that has ever been presented to our notice. We shudder at the consequences that may ensue from its publication. We hope that the enlightened conscience of the profession may cause them to exclaim Procul, Procul! O Esti Profani, at any such scheme.

And the worst of it is that under the existing laws such a device on the part of a dishonest debtor seems to be a successful one.

3610 of Ch. 176 of the Code of 1904 provides that if it appear on examination of the garnishee that there is any liability on him, he may be ordered to pay such debt, but of course no such liability will accrue until the labor has been performed. The rule is well-stated in several Virginia cases:

It is the general rule that a garnishee is not chargeable unless the defendant could recover of him what the plaintiff seeks to secure by garnishment, and it follows, therefore, that a contingent liability of a contract affords no ground for garnishment. The cases will illustrate what is meant by a contingent liability in this connection. Thus it is a very usual thing for a railroad company to contract for the building of its road and by the contract to require the contractor to do his work by a specific time, to provide, that, if he should not put force enough on the road to comply with his contract in this respect, the engineer of the railroad company may employ a force sufficient for the purpose and pay such force out of the price contracted to be paid to the contractor for the work. The company also retains a portion of the pay of the contractor as an indemnity against any loss by the noncompliance of the contractor with his contract, usually also providing, that, if the contractor neglect his work, the company may declare the contract void. If, while such a contract is still subsisting, the contractor abandons his work, what may be supposed to be due him can not be garnished in the hands of the railroad company, for such debt is contingent, and it may turn out, that by reason of the subsequent cost of completing

his contract, the apparent debt due to him from the railroad company will be extinguished. Strauss *v.* Chesapeake, etc., R. Co., 7 W. Va. 368; Baltimore, etc., R. Co. *v.* Gallahue, 14 Gratt. 563; Wagon Co. *v.* Peterson, 27 W. Va. 335.

So an insurance company can not be made a garnishee, while it has the option to rebuild the burned property or pay its value; for such liability is contingent and never will exist if it elect to rebuild. Wagon Co. *v.* Peterson, 27 W. Va. 336.

So the maker of a negotiable note can not be garnished; for the note being payable to order, it is contingent to whom he owes the debt. Wagon Co. *v.* Peterson, 27 W. Va. 336.

So a sailor's wages, which are contingent upon the voyage being successful, can not be attached or garnished till the voyage is complete. Wagon Co. *v.* Peterson, 27 W. Va. 336.

And in other jurisdictions the rule is that where the contract of employment is entire, a specified salary per month to be paid to an employee at the end of each month is not liable to garnishment before the end of the month in which it is earned, because the question whether it will become due depends upon the contingency of the employee's remaining in the employer's service. Central Bank *v.* Ellis, 20 Ont. App. 364; Norton *v.* Soule, 75 Me. 385; Wyman *v.* Hichborn, 6 Cush. (Mass.), 264; Potter *v.* Cain, 117 Mass. 238; Foster *v.* Singer, 69 Wis. 392, 2 Am. St. Rep. 745.

In Burlington, etc., R. Co. *v.* Thompson, 31 Kan. 180, 47 Am. Rep. 497, it was also held that where, at the time of service of garnishee process, the defendant is in the employ of the garnishee, the garnishee proceedings bind only the amount due at the date of service.

So we are irresistibly lead to the conclusion that, however much this case may contravene sound public policy, it was correctly decided. Unearned wages can constitute only a contingent liability, and failure to perform the services as agreed on would give the master the immediate right to discharge such servant before he had gained an indefeasible right to the same.

If employers choose to make agreements of this kind with their servants, they can successfully exempt such wages from garnishment, it would seem.